In their Lordships' view it is only if the president or his deputy reaches the conclusion that the circumstances warrant a decision to dismiss and that decision is conveyed to the employee under paragraph 3(*b*)(vi) that the principles of natural justice start to be applicable for it is only at that stage that any rights are conferred upon the employee namely a right of appeal to the establishments committee.

The appellants' case however depends upon the submission that the failure to observe the rules of natural justice occurred at an earlier stage. After the head of the department carried out the inquiry under rule 3(*b*)(ii) at which the appellants were either present or represented the deputy president put three questions in writing to the head of the department to which he received written answers. Neither questions nor answers were disclosed to the appellants. That, it was said, was a defect in the respondent council's procedure and so Tan Ah Tah J. held, though he held it was cured by what followed. This however does not help the appellants for the reason already given by their Lordships that at that stage the rules of natural justice had no application. Had their Lordships been of a contrary opinion their Lordships would have agreed with Tan Ah Tah J. that this procedure was defective though for the reasons now to be mentioned they agree with him that what followed, cured that defect.

The appellants appealed; and in accordance with rules 3(*b*)(vi) and (vii) there was a hearing before a sub-committee of the establishments committee which was in the nature of a rehearing and evidence was called *de novo*. No attack upon the propriety of those proceedings (or that it was only a sub-committee) has been made.

Their Lordships were referred to the case of *Walter Annamunthodo* v. *Oilfields Workers' Trade Union* [2] and to the observations of Lord Denning at p. 956. It was there held that the accused was entitled to complain that a new charge against him not made before the hearing tribunal but for the first time before the appellate tribunal could properly form a ground of appeal to the courts on the principle that the rules of natural justice had not been observed. Their Lordships agree.

But the complaint here was that certain evidence was wrongly received by the tribunal at first instance, in the absence of the employee, a serious complaint. But when on appeal there is a rehearing by way of evidence *de novo* from the witnesses it seems to their Lordships that different considerations apply. The establishments committee heard evidence *de novo* in the presence of the appellants or their representatives. Upon that evidence only the committee held that the appellants were rightly dismissed. That cured the alleged defect at an earlier stage and is in itself conclusive against the appellants as the proceedings before the establishments committee are not attacked.

For these reasons their Lordships will dismiss this appeal. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Collyer-Briston & Co.; Linkcaters & Paines.*

SOLAIAPPAN & ORS. v. LIM YOKE FAN & ORS.

[F.C. (Azmi C.J. (Malaya), Suffian & MacIntyre F.JJ.) April 24, 1968]

[K.L. — Federal Court Civil Appeal No. X.20 of 1967]

Companies — Directors — Removal of — Removal of all directors and in their place electing new directors — Notice of resolution to that effect — Defective notice — Powers of general meeting — Companies Enactment (F.M.S. Cap. 58) Table A of 4th Schedule — Companies Act, 1965, ss. 3, 128 & 153.

This was an appeal against the decision of Raja Azlan Shah J., ([1967] 2 M.L.J. 7) dismissing with costs an action brought by the appellants in the High Court at Kuala Lumpur.

The nine plaintiffs (appellants) and the first thirteen defendants were shareholders of the Len Omnibus Co. Ltd., a pre-war company registered under the Companies Enactment (F.M.S. Cap. 58). Defendants Nos. 14 and 15 were secretaries of the company. (All the defendants were respondents). A notice was sent out by the secretaries to convene an annual general meeting of the company to be held on Friday, September 30, 1966, at 8 p.m. Among the business to be transacted at the meeting (according to the notice) were the election of directors in place of those retiring, to pass and adopt the directors' report and statement of accounts for the year ended December 31, 1965, and to confirm the payment of three dividends made during the year 1955. The plaintiffs were dissatisfied with the auditor's report. The articles of association provide that 1/3 of the directors should retire, but the plaintiffs decided to remove all the existing directors and replace them by 13 others. So, on September 26, 1966, i.e., three clear days before the proposed annual general meeting, the first plaintiff sent a notice under article 49 (which required at least three clear days' notice) to the secretary of the company informing him that he proposed the following resolution for consideration at the annual general meeting:—

> "Resolved that this meeting do and hereby remove all the present directors of the company and in their place do elect new directors to fill in the vacancies thereby created."

This notice was received by the secretary on the same day.

On September 30, 1966, the annual general meeting was held, as scheduled. First the minutes were passed. Then followed a discussion of the directors' report and the auditors' report; the plaintiffs Nos. 1, 6 and 7 called for a poll, the result of which was that the reports were not passed. Soon after came the business of the election of directors. The letter containing the notice was read out for the information of shareholders present.

There were proposals and counter-proposals on the issue and the meeting dragged on. At about 3 a.m. the two solicitors left the meeting. Some of the shareholders present refused permission for the company's busses to operate at 6.30 a.m. on Saturday, October 1, 1966. It was a condition of the road haulage permit issued to the company that they should operate their buses by 6.30 every morning. At about noon the chairman left the chair. He had steadfastly refused to put the first plaintiff's resolution to the vote. The members who were still present elected one of the directors, Loh Chan, to act as chairman. The new chairman put the first plaintiff's resolution to the vote and eventually all the 13 directors were voted out and 13 new directors (the nine plaintiffs and defendants Nos. 1, 6, 12 and Loh Chan) were voted in. After disposing of some further business, the meeting eventually ended at 12.30 p.m. that day. It had lasted 16½ hours. The plaintiffs claiming to be lawful directors asked the defendants to hand over the management of the company to them. The defendants refused, the first thirteen claiming that they were lawful directors.

On October 13, 1966, Pillai (defendant No. 15), acting as secretary of the board of directors, issued another notice calling an annual general meeting of the members to be held on October 29, 1966, in continuation of the meeting held on September 30, 1966. The plaintiffs protested, but nevertheless the defendants proceeded to hold this second meeting and to elect four persons, namely, defendants Nos. 10 to 13 as directors in place of the directors who were alleged to have retired. The defendant No. 15, acting as secretary, further issued a notice calling an extraordinary general meeting for October 26, 1966, to pass and adopt the report of the directors and accounts for the year ended December 31, 1965.

The plaintiffs then brought this action. They claimed that they were the duly elected directors of the company because the annual general meeting which began on September 30, 1966, and the subsequent meeting held on October 29, 1966, were null and void. The defendants contended that the election of directors during the marathon meeting was void because, first, it was contrary to section 128 of the Companies Act, 1965; and secondly, shareholders present at that meeting had been subject to duress and undue influence. The defendants contended further that the meetings subsequently held on October 29, and November 26, were valid meetings and decisions arrived thereat were legal. Thus there were two issues:—

(a) Were the plaintiffs properly elected directors at the annual general meeting held on September 30, and October 1, 1966?

(b) If they were properly elected, was such election invalidated by duress and undue influence?

The learned trial judge dismissed the plaintiffs' claim, holding that, first, on the law, section 128 of the 1965 Act applied, the necessary 28 days' notice had not been given and therefore the plaintiffs had not been properly elected directors and, secondly, there was duress and undue influence at the meeting to vitiate the result of the election. On appeal,

Held, dismissing the appeal: (1) the notice to be given under articles 49 and 50 must be something ancillary or subsidiary, which could be properly brought under the terms of the notice convening the meeting, and therefore the first plaintiff's resolution passed at the meeting on September 30, and October 1, 1966, was passed on a bad notice;

(2) the purported dismissal of the old directors and their replacement by the plaintiffs was null and void.

Case referred to:—

(1) *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (1883), 23 Ch. D. 1.

A FEDERAL COURT.

Ng Ek Teong (*V. Ponniah* with him) for the appellants.

Morris Edgar (*Albert S. F. Lian* with him) for the respondents.

Cur. Adv. Vult.

Suffian F.J. (having started the facts relevant to the appeal continued): This company was registered on 7th May, 1937, under the F.M.S. Companies Enactment (Cap. 58). Subsection (ii) of section 13 of the Enactment provides:—

"Articles of Association may adopt all or any of the regulations contained in Table A . . . ."

Article 86 of Table A of the Enactment dealt with the removal of directors before the expiry of their term of office. It reads:—

"The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; . . . ."

The articles in Table A are only specimens, and it is open to any company such as the Len Omnibus Company to adopt all or any of them, and even to add some of their own. If it adopted article 86 of Table A, it could under it remove its directors by extraordinary resolution.

What did the company do? They say in the very first section of their articles:—

"The regulations contained in the Table "A" . . . . of the Companies Enactment (Cap. 58 of the Revised Edition) shall not apply to this company."

As regards directors, they say in article 71 that at every ordinary general meeting one-third of the directors for the time being shall retire. That article reads:—

"At every ordinary general meeting of the company one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire but shall be eligible for re-election. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who become directors on the same day as those who retire shall, unless they otherwise agree among themselves, be determined by lot."

Then in article 74 they provide for the removal of directors. It reads:—

"The company in general meeting may from time to time alter the qualification and number of the directors and may remove any director and may appoint another person in his stead."

These provisions are not contrary to any provisions of Cap. 58 and are lawful.

It is to be noted that Cap. 58 had nothing corresponding to section 128 of the Companies Act, 1965. Therefore if it was desired to remove any director prematurely, the only provision enabling this to be done was article 74. But of course there must be compliance with the other

articles dealing with notice, etc. These are articles 47 to 51 which read:—

"'47. Seven clear days' notice at least of every general meeting, ordinary or extraordinary and by whomsoever convened, specifying the day, place and hour of meeting, and in the case of special business, the general nature of such business, shall be given to the members in manner herein after mentioned or in such other manner (if any) as may be prescribed by the company in general meeting but an accidental omission to send such notice to any member shall not invalidate any of the proceedings at any general meeting.

"48. Where it is proposed to pass a special resolution the two meetings may be convened by one and the same notice and it is no objection to such notice that it only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting.

"49. Any member entitled to be present and vote at any meeting of the company may submit any resolution to such meeting provided that at least three days before the day appointed for the meeting he shall have served upon the company a notice in writing signed by him containing the words of the proposed resolution and stating his intention to submit the same.

"50. Upon receipt of any such notice as in the preceding article mentioned, the company shall include such resolution in the notice of the meeting in any case where the notice of intention is received before the notice of the meeting is issued and shall in any other case issue as quickly as possible to the members notice that such resolution will be proposed.

"51. All business shall be deemed special that is transacted at a general meeting with the exception of sanctioning a dividend and the consideration of the accounts, balance sheet, the ordinary report of the directors, and election of directors and auditors."

So if this dispute had arisen before the enactment of the 1965 Act, there would have been no need to consider whether or not there was any conflict between the articles and the relevant statute.

Any company not adopting article 86 of Table A in Cap. 58 and without any provision corresponding to article 74 of the Len Omnibus Company, would have no power to remove a director. If it wished to do so, it would first have to amend its articles to give it the power. Having done so, it can then remove the director, subject of course to any contractual rights the director may have against the company. See *Imperial Hydropathic Hotel Co., Blackpool,* v. *Hampson.*[1]

On 4th July, 1946, Cap. 58 was repealed by the Companies Ordinance No. 13 of 1946. This Ordinance applied the Straits Settlements Companies Ordinance, 1940, with modifications to the whole of Malaya. In repealing Cap. 58, the 1946 Ordinance expressly provided by sub-section (2) of section 15 as follows:—

"(2) ....

(a) Nothing in these repeals shall affect any proclamation, order, conveyance, mortgage, deed or agreement made, resolution passed, direction given, proceeding taken, instrument issued or thing done under any former enactment, but any such proclamation, order, conveyance, mortgage, deed, agreement, resolution, direction, proceeding, instrument or thing shall, if in force at the commencement of this Ordinance, continue in force, and so far as it could have been made, passed, given, taken, issued or done under this Ordinance shall have effect as if made, passed, given, taken, issued or done under this Ordinance.

(b) (Not relevant).

(c) Any register kept under any former enactment shall be deemed part of the register to be kept under the corresponding provisions of the Companies Ordinance, 1940, subject to any modification effected by this Ordinance.

(d) (Not relevant)."

and by section 16(1) and (2) as follows:—

"Nothing in this Ordinance shall affect —

(1) the incorporation of any company registered under any former enactment;

(2) any provisions corresponding to Table A which may be contained in any former enactment; . . . ."

The effect of this is to continue in force the articles of association of this company as if they had been made under the new company legislation.

Again it is to be noted that there is nothing in the 1946 Ordinance corresponding to section 128 of the Companies Act, 1965, so that a director may be removed only if the articles so provide and, if the articles do not so provide, he cannot be removed unless the articles are first amended.

Then on 15th April, 1966, the Straits Settlements Companies Ordinance applicable in Malaya was repealed and replaced by the Companies Act No. 79 of 1965.

This Act has a new provision, section 128, taken from section 184 of the English Companies Act of 1948. This new section 128 so far as material reads:—

"(1) A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed.

(2) Special notice shall be required of any resolution to remove a director under this section or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

x x x x x

(7) Nothing in the foregoing provisions of this section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that

as director or as derogating from any power to remove a director which may exist apart from this section."

With regard to the special notice required by sub-section (2), section 153 provides:—

"Where by this Act special notice is required of a resolution, the resolution shall not be effective unless notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved, and the company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice thereof, in any manner allowed by the articles, not less than fourteen days before the meeting, but if after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date twenty-eight days or less after the notice has been given, the notice, although not given to the company within the time required by this section, shall be deemed to be properly given."

The question that arises is this. If it is desired to remove prematurely a director of the Len Omnibus Company, at the material time must at least 28 days' notice be given as required by section 128 read together with section 153 of the 1965 Act, or may he be removed simply in accordance with the articles? If he may be removed in accordance with the articles (without complying with section 128 of the 1965 Act), was the notice in the letter of 26th September, 1966, sent by the first plaintiff, sufficient?

In my judgment, Mr. Ng Ek Teong is right. Section 128 co-exists with article 74. On this, I disagree with the judge and Mr. Edgar. I do so for the following reasons:—

(a) The words underlined in sub-section (1) of section 128 explicitly say that a public company may remove a director prematurely, notwithstanding anything in its memorandum or articles. This means that he may be removed even if the articles do not authorise removal, and there would thus be no need to amend the articles first.

(b) The words underlined in sub-section (7) explicitly say that the power to remove under the section does not derogate from any power to remove a director prematurely which may exist apart from this section. This means that if power exists under the articles, then a director may be prematurely removed under the articles or under the section.

(c) The special notice required under section 128(2) and section 153 is required only if power to remove is exercised under the section. The words underlined in the sub-section make this quite clear. No such special notice is required if power to remove is exercised under the articles.

(d) Indeed a company registered under the 1965 Act has power to remove by ordinary resolution a director under the articles, apart from under section 128, if it adopts the specimen articles in Table A of that Act; article 69 in Table A reads:—

"The company may by ordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director."

Certainly this is so in the case of companies registered under the 1965 Act. What about companies registered under previous legislation such as the Len Omnibus Co.? Section 3 of the Act deals with this.

First, the first sub-section repeals the old law. Then sub-section (2) provides as follows:—

"Unless the contrary intention appears in this Act —

(a) all persons things and circumstances appointed or created by or under any of the repealed or amended written laws or existing or continuing under any of such written laws immediately before the commencement of this Act shall under and subject to this Act continue to have the same status operation and effect as they respectivelv would have had if such written laws had not been so repealed or amended; and

(b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not disturb the continuity of status operation or effect of any Order in Council order rule regulation scale of fees appointment conveyance mortgage deed agreement resolution direction instrument document memorandum articles incorporation nomination affidavit call forfeiture minute assignment register registration transfer list licence certificate security notice compromise arrangement right priority liability duty obligation proceeding matter or thing made done effected given issued passed taken validated entered into executed lodged accrued incurred existing pending or acquired by or under any of such written laws before the commencement of this Act."

Ignoring for a moment the opening words of the sub-section, clearly the company and its articles are continued as if registered under the 1965 Act. Returning to the opening words, is there a contrary intention in the Act? I have already discussed the effect of the revolutionary section 128, and I think that its explicit language makes clear beyond doubt that the power to remove a director prematurely conferred by it, is additional to any similar power conferred by the articles.

Then sub-section (3) which reads:—

"Nothing in this Act shall affect the Table in any repealed written law corresponding to Table A of the Fourth Schedule or any part thereof (either as originally enacted or as altered in pursuance of any statutory power) or the corresponding Table in any former written law relating to companies (either as originally enacted or as so altered) so far as the same applies to any company existing at the commencement of this Act."

expressly saves this company's articles.

Therefore it would be quite proper for the plaintiffs to remove the directors simply under the articles.

The next question is, if the plaintiffs can remove the directors under the articles (as I think they can) without giving the 28 days' notice required by sections 128 and 153 of the 1965 Act, did the plaintiffs give the requisite notice prescribed by the articles?

Mr. Edgar says that they did not.

Article 51 provides that all business shall be deemed special that is transacted at a general meeting with the exception of, among other things, the election of directors. So the removal of directors is special business.

Article 47 provides by implication that 7 clear days' notice at least must be given of special business. Mr. Ng Ek Teong concedes that the notice sent out by the secretaries convening the annual general meeting on 30th September, 1966, did not contain notice of the proposed removal of directors.

But he contends that the notice of 26th September, 1966, sent by the first plaintiff under articles 49 and 50 was sufficient. At first sight this would appear to be so. When the first plaintiff received the secretaries' notice calling for an annual general meeting, he studied the reports circulated with the notice and was dissatisfied with the directors. From his point of view, what better way of giving notice to remove all of them except under articles 49 and 50? But on the authority of *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson,*[1] I hold that the notice to be given under articles 49 and 50 must be something ancillary or subsidiary, which could be properly brought under the terms of the notice convening the meeting, and therefore the first plaintiff's resolution passed at the meeting on 30th September and 1st October, 1966, was passed on a bad notice.

In the case cited, the company had the following articles:—

45. "That 7 days' notice should be given of any special meeting, specifying the place and the time of meeting, and the purpose for which it was to be held."

46. "That any shareholder might on giving not less than 3 days' previous notice submit any resolution to a meeting beyond the matters contained in the notice given of such meeting."

Article 47 required that a notice should be left at the registered office of the company.

The articles did not provide for the removal of directors.

Proper notice was given of a special general meeting to be held on 28th August, 1882, under article 45. Some members were dissatisfied with the administration of the company and wanted two directors to be replaced. Accordingly, they gave 3 days' notice under article 46.

The special general meeting was held as scheduled on the 28th August, 1882. The resolutions mentioned in the notice convening the special general meeting were passed.

The chairman then left the chair, and declared the meeting at an end, but a new chairman was elected and the additional resolutions of which notice had been given by the dissatisfied members were passed, including two resolutions the effect of which was to remove and replace the two directors.

The court held that the notice was bad and the election of the two new directors void. Jessel M.R. at page 9 said:—

". . . . it was suggested that 3 days' notice given of a resolution by a shareholder would do instead of the notice specified in clause 45. In my opinion, it would not. The notice given by clause 45 is to be given to every shareholder. The notice given by clause 46 is only to be left at the registered office of the company; the one notice is 7 days' notice, and the other is 3 days' notice. It is plain to me that the notice to be given under clause 46 is something ancillary or subsidiary, which could be properly brought forward under the terms of the notice convening the meeting, and therefore the resolution passed at the first meeting was passed on a bad notice."

In my judgment, the purported dismissal of the old directors and their replacement by the plaintiffs was null and void. Therefore this appeal is dismissed with costs.

Azmi C.J. (Malaya) concurred.

MacIntyre F.J.: This is an appeal against the decision of Raja Azlan Shah J., dismissing with costs an action brought by the appellants against the respondents, in the High Court at Kuala Lumpur, praying for certain reliefs, namely: (i) for a declaration that they are the lawful and duly constituted directors of the Len Omnibus Company, by virtue of their election as such at an annual general meeting of the company held on September 30, 1966; (ii) for a declaration that "the purported continued annual general meeting held on October 29, 1966, was null and void, since it was improperly convened; (iii) for a declaration that any elections or resolutions carried out at that meeting are void and of no effect; and (iv) for orders granting certain consequential reliefs and the costs of the action.

It is common ground that the annual general meeting held on September 30, was convened by a notice which included in its agenda an item for the election of directors for the ensuing year. The board then consisted of 13 directors, namely, respondents 1 to 13. The regulations regarding the election of directors at an annual general meeting are to be found in article 71 of the company's articles of association which reads as follows:—

"At every ordinary general meeting of the company one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire but shall be eligible for re-election. The directors to retire in every year shall be those who have been longest in the office since their last election, but as between persons who become directors on the same day those who retire shall, unless they otherwise agree among themselves, be determined by lot."

After the receipt of the notice, the 1st appellant, by a letter dated September 26, notified respondent No. 14, who was then the secretary of the company, of his intention to move a resolution at the annual general meeting as follows:—

"Resolved that this meeting do and hereby remove all the present directors of the company and in their place do elect new directors to fill in the vacancies thereby created."

This letter was not circularised for the information of the shareholders as the directors were advised not to do so by the company's legal adviser.

The annual general meeting was held, as scheduled, on September 30. After the notice convening the meeting was read by the secretary and the minutes of the previous annual general meeting read and confirmed, the reports of the directors and auditors and the statement of accounts for the year ended 31st December, 1965 were taken up for consideration. After some discussion, by a majority vote, the meeting rejected the reports. Then after dealing with another item regarding the payment of dividends, the business of electing directors for the ensuing year was taken up for consideration.

The 1st appellant's letter dated September 26 was read out to the members at his request. He then claimed that his resolution for the removal of the directors and the election of new directors was a practice which had been in vogue for over thirty years and that the provisions of article 71 need not be observed. The directors and their supporters, who had by then sensed that they were in a minority, sought legal advice. The company's solicitor, Mr. Morris Edgar, was present and he advised that the meeting should strictly comply with the requirements of article 71, as the proposal to remove the directors being a special business of which no notice was given to the members, the resolution, if passed, would be invalid. On the other hand, Mr. C. Selvarajah, the solicitor advising the 1st appellant and his supporters, thought that a special notice was not required and that the resolution could be moved. One thing, however, is clear. The right to remove the directors and to appoint new directors in their place at a general meeting is a right which is provided for by the company's articles of association, namely article 74, which reads as follows:—

"The company in general meeting may from time to time alter the qualification and number of the directors and may remove any director and may appoint another person in his stead."

The chairman of the meeting, after listening to the conflicting legal opinions, declared that, if the members so desired, the resolution could be moved and put to the vote. The directors, however, had no intention of allowing a vote to be taken, and Rasham Singh, the 2nd respondent, thereupon, dragged the chairman into the office room to confer with the directors. The result of the conference was that the chairman resumed his seat and brought the meeting to a deadlock by the simple expediency of refusing to act from the chair. The deadlock thus continued till the early hours of the morning when some of the shareholders who were employed as bus drivers and conductors had to report for duty. To enable them to be present at the meeting, someone was said to have parked an omnibus at the entrance to the garage and removed the ignition key thus immobilising all the buses. However, some of the members had left earlier to go to bed while some others were said to have slept in their chairs, but the hard core of the appellant's party remained behind to carry on with the meeting urging the chairman to put the resolution to the vote and the chairman stalling for time. Eventually, it became a trial of endurance between the appellant's party on the one hand and the chairman on the other, until about noon of October 1st when the chairman vacated the chair and left the meeting. Thereupon, one Loh Chan was elected chairman and the 1st appellant's resolution, having been moved and seconded, was put to the vote and carried unanimously. The thirteen new directors elected were the nine appellants, respondents 1, 6 and 12 and Loh Chan. The meeting then disposed of the remaining items in the agenda, except the item regarding Malay participation, which was adjourned for consideration at a separate meeting.

The respondents (1 to 13), refused to hand over the reins of office to the appellants and gave notice convening another general meeting on October 29, purporting to be a continuation of the annual general meeting of September 30, in order to dispose of, what was claimed to be, the unfinished items in the agenda, including the election of directors. The meeting was duly held on October 29, and in accordance with the provisions of article 71, four retiring directors, namely, respondents 10, 11, 12 and 13 were re-elected as directors. In consequence whereof, the present action was commenced on November 16, 1966.

In their statement of defence, the respondents, pleaded that the annual general meeting held on September 30 had no right to consider the resolution for the removal of all the directors acting on the notice given by the 1st appellant on September 26; and they deny that any election of directors ever took place on September 30. As for the alleged election of directors on October 1st, they pleaded that the election was ineffective for non-compliance with the provisions of section 128 of the Companies Act of 1965; or alternatively, it was invalid and had no binding effect since the vote was obtained after subjecting the shareholders present to duress and undue influence.

In order to determine the issues in this appeal, it is necessary to find the answers to the following questions, namely:—

1. Is the power to remove a director before his term of office expires governed by the articles of association of the company or by the provisions of section 128 of the Companies Act of 1965?
2. If governed by the articles, was the notice of the resolution given by the 1st appellant by his letter of September 26, a valid notice?
3. Was the resolution passed by the meeting on October 1st obtained under circumstances of duress or undue influence?
4. Were the elections of directors held at the meeting on October 29 valid and effective?

The answer to the first question depends upon whether section 128 of the Companies Act of 1965 (hereinafter referred to as the 'Act') is permissive or mandatory; or in, other words, whether its provisions can co-exist with or must supersede, the articles of association in regard to the removal of a director. If the section is mandatory, then a special notice of the resolution will have to be given as provided under section 153 of the Act. Section 128, sub-section (i) and (ii) of the Act read as follows:—

(i) "A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed.

(ii) Special notice shall be required of any resolution to remove a director under this section or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting."

Section 153 of the Act reads:—

"Where by this Act special notice is required of a resolution, the resolution shall not be effective unless notice of the intention to move it has been given to the meeting at which it is moved, and the Company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting etc. . . ."

It was urged on behalf of the respondents that the phrase "notwithstanding anything in its memorandum or articles of association" in section 128(1) of the Act was intended to indicate that the section superseded the articles of association. It was further contended that if it was the object of the legislature to allow this section to co-exist with the relevant articles of association then the phrase used would have been: "subject to the memorandum or articles of association". Attractive as this argument may be, it cannot be denied that the use of that phrase could also imply the provision of an alternate method to remove directors apart from the existing provisions in the articles of association. This seems to be the more logical interpretation of the phrase in view of the repeated reference in sub-section (2) of section 128, to the removal of a director "under this section".

Section 128 of our Act conforms, *in pari materia*, to section 120 of the Australian Companies Act of 1961 and to section 184 of the English Companies Act of 1948. At page 342 of the "Australian Company Law" by *Patterson and Ednie* (1962 edition), the learned authors after commenting on the objective of section 120, have this to add:—

"*Miscellaneous*: It should be noted that this section applies to public companies. The section is designed to consist with any provision which may be found in the companies articles relating to rotational retirement of directors."

The word "consist" which I have underlined above appears to be a misprint and I think that the word intended to be used was 'coexist'. Again, with reference to section 184 of the English Act, the following passage from page 359 of "Handbook on the Formation, Management and Winding-up of Joint Stock Companies" by *Gore-Browne* (41st Edition) seems appropriate and I quote:—

"It should be noted that the provisions of this section do not affect or apply to any other power (*e.g.* under the articles) to remove directors. Prior to the 1948 Act, articles commonly contained a power to remove a director by extra-ordinary resolution, and such a power may still be taken with advantage, since proceedings under the articles will not involve the complication of special notice or the statutory rights in regard to making representations."

The Len Omnibus Company was incorporated under the provisions of the Companies Enactment (Cap. 58). It had formulated its own articles of association instead of adopting Table A. The Enactment was repealed by the Companies Ordinance of 1940; but by section 339(2) the continuity of its constitution was assured. The 1940 Ordinance was repealed by the Companies Act of 1965 and section 3(2)(b) thereof declares that the repeal of the previous law "shall not disturb the continuity of status, operation and effect" of, *inter alia*, the memorandum and articles of association. It would therefore be in accord with the general principles of interpretation, if the other provisions of the Act are interpreted in conformity with this section and not against it, unless the clear intention to override the articles of association is expressly stated therein. It is said in *Palmer's* Company Precedents (17th Edition) at page 371, that:—

"In considering whether any clause in the articles is or is not consistent with the Act or Acts, the provisions contained in Table A should be borne in mind, for it must be assumed, *prima facie*, that those provisions and similar provisions, as approved by the legislature, were regarded by the legislature as legal and

they can be looked on to ascertain the views of the legislature on the matters contained in them".

It is significant to note that if a company is incorporated under the Act and it adopted Table A as its articles of association, then a director could, notwithstanding the provisions of section 128, be removed from office before the expiry of his term, by virtue of the provisions of article 69, by an ordinary resolution and without special notice. If therefore, section 128 and article 69 could co-exist, there can be no reason why article 74 of the articles of association of the Len Omnibus Company, the operative effect of which is preserved by section 3(2)(b) of the Act, and section 128 cannot co-exist.

The answer then to the first question is that a director could be removed from office either under section 128 of the Act or under the provisions of article 74.

The next question is whether or not the notice of the resolution given by the 1st appellant by his letter of September 26, is valid and effective? The annual general meeting of September 30, was convened by another notice given in compliance with article 47 which reads:—

"Seven clear days' notice at least of every general meeting, ordinary or extraordinary and by whomsoever convened, specifying the day, place and hour of meeting, and in the case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned or in such other manner (if any) as may be prescribed by the company in general meeting but an accidental omission to send such a notice to any member shall not invalidate any of the proceedings at any general meeting."

This article lays down the rule that when a general meeting is convened for the purpose of transacting any special business then the members must also be notified of the general nature of the business in the manner thereafter mentioned or in such other manner (if any) prescribed in a general meeting. There is nothing on the record to show that any rules for service of notices were prescribed by a general meeting. Article 51 lays down the rule that any business transacted at a general meeting, other than the sanctioning of a dividend and the consideration of the accounts, balance sheet, the ordinary report of the directors, and the election of directors and auditors, shall be deemed special business. Therefore, the resolution to remove the directors proposed by the 1st appellant in his letter of September 26 must be regarded as special business within the meaning of this article. The next requirement of article 47 is that the notice giving particulars of the special business must be given to the members. The manner in which a notice should be given to the members is prescribed by article 112 which reads as follows:—

"Each member shall give a registered address in the Federated Malay States, Straits Settlements or Johore and any notice or other document required to be served on any member shall be deemed sufficiently served by personal service, or by leaving the same at, or sending it prepaid through the post addressed to, such registered address."

It was conceded, on behalf of the appellants, that the notice issued under article 47, did not contain any reference to the special business proposed by the 1st appellant. It is also clear from the evidence, that with the exception of the secretary and the directors, the members first came to know of the resolution when the notice was read out at the meeting.

Counsel for the appellants contended that the relevant article for giving notice of the 1st appellant's resolution was article 49 which reads:—

"Any member entitled to be present and vote at any meeting of the company may submit any resolution to such meeting provided that at least three days before the day appointed for the meeting he shall have served upon the company a notice in writing signed by him containing the words of the proposed resolution and stating his intention to submit the same".

At a first glance it will be seen that article 47 requires seven clear days' notice to be given to the members; whereas article 49 requires three days notice, to be served upon the company. It is unlikely, therefore, that the notices under the respective articles were intended to be served in respect of the same matter. Incidentally, the letter of September 26 was served upon the secretary of the company; whereas article 117 provides that the service of a notice upon the company shall be deemed sufficient if it was addressed to the managing director and left at the registered office of the company. To advert to the question of whether the respective notice could be in respect of the same matter, the point was considered in the case of *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson.*[1] The company concerned in that case, had formulated its own articles of association and the relevant articles were almost similar to the articles of the Len Omnibus Company. Thus articles 45 and 46 (corresponding to articles 47 and 49) read:—

"45. That seven day's notice at least should be given of any special meeting, specifying the place and the time of meeting and the purpose for which it was to be held.

46. That any shareholder might on giving not less than three day's notice submit any resolution to a meeting beyond the matters contained in the notice given of such meeting."

The facts of that case are also similar, except that there was no provision in the articles to remove a director prematurely and the resolution also contained a proposal to enact a rule granting power to remove a director. A section of the shareholders had, however, taken advantage of article 46 to move a resolution at a meeting convened under article 45. In his judgment at page 9, Jessel M.R. said:—

"But it was suggested that three days' notice given of a resolution by a shareholder would do instead of the notice specified in clause 45. In my opinion it would not. The notice given by clause 45 is to be given to every shareholder. The notice given by clause 46 is only to be left at the registered office of the Company, the one is seven days' notice and the other is three days' notice. It is plain to me that the notice to be given under clause 46 is something ancilliary or subsidiary, which could be properly brought under the terms of the notice convening the meeting, and therefore the resolution passed at the first meeting was passed on a bad notice."

I would, with respect, adopt the argument in this judgment and hold that the resolution removing all the directors and electing the appellants and four others as directors at the annual general meeting held on September 30 and October 1, was passed on a bad notice. In the circumstances, the question of duress or the validity of the election of directors at the meeting held on October 29, 1966 becomes a matter of academic interest only and I need not consider them. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Braddell & Ramani; Morris Edgar & Co.*

PUBLIC PROSECUTOR v. LEONG KOW CHAI

[A.Cr.J. (Chang Min Tat J.) April 27, 1968]
[Ipoh — Criminal Appeal No. 7 of 1968]

Road Traffic — Using car as public service vehicle — No insurance cover for such user — Road Traffic Ordinance, 1958, ss. 74(2), 92(1) & 144.

Criminal Procedure — Joinder of trial — Charges under ss. 74 & 92, Road Traffic Ordinance, 1958 — Criminal Procedure Code (Cap. 6), s. 165(1).

The respondent was charged under section 92(1) of the Road Traffic Ordinance, 1958, for using his car as a public service vehicle (hereinafter referred to as the pirate-taxi charge) and under section 74(2) of the Ordinance, for using the car as a public service vehicle without there being in force a policy of insurance for such user (hereinafter referred to as the insurance charge). Both charges were tried together. At the close of the case for the prosecution, the magistrate called for the defence on the pirate-taxi charge, but discharged the respondent under the provisions of section 173(g) of the Criminal Procedure Code (Cap. 6) in respect of the insurance charge. The magistrate relied on the case of *Ali bin Hassan* v. *Public Prosecutor* [1] to justify his decision not to call on the defence in respect of the insurance charge. The public prosecutor appealed against the order of discharge.

Held, setting aside the order of discharge: having regard to the fact that both offences were committed in one and the same transaction, the joinder under section 165(1) of the Criminal Procedure Code, of the insurance charge and the pirate-taxi charge in the same trial was proper.

Ali bin Hassan v. *Public Prosecutor,*[1] not followed.

Cases referred to:—

(1) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.

(2) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

(3) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoff bin Chin (Deputy Public Prosecutor) for the appellant.

S. A. Lingam for the respondent.

Chang Min Tat J.: The respondent was charged in the magistrate's court at Ipoh with using his car BG 6576 on 7th February, 1967, in Ipoh as a public service vehicle, an offence under section 92(1) of the Road Traffic Ordinance (hereinafter referred to as the pirate-taxi charge) and with using such vehicle at the same time and place as a public service vehicle without there being in force a policy of insurance for such user, an offence under section 74(2) of the Road Traffic Ordinance (hereinafter referred to as the insurance charge).

On the fact of user, the evidence adduced by the prosecution, besides the evidence of groundwork observation, was to the effect that at the time and place mentioned in the charge the defendant was stopped by the police, there were in his car 2 male and a female Chinese. On the question of insurance cover, the investigation officer produced a policy of insurance for the vehicle for cover against third party risks for user as a private vehicle, obtained by him from the respondent. This policy was identified by a representative of its issuer and, further, the enforcement officer of the Road Traffic Department was called to give evidence of the registered ownership of the vehicle in the respondent and he confirmed the type of insurance cover issued for its user.

On this evidence, the learned magistrate, at the close of the case for the prosecution, called for the defence on the pirate-taxi charge, but discharged the respondent under the provisions of section 173(g) of the Criminal Procedure Code (Cap. 6) in respect of the insurance charge. Under section 173(g), he has undoubtedly the power to discharge any accused at any stage of the proceedings if, for reasons to be stated, he considers the charge to be groundless, but it goes without saying that the power is to be exercised judicially.

The record is silent as to the reasons which induced the learned magistrate to do so. Read carefully and for its precise effect, that section imposes on a magistrate a duty to record the reasons he considers the charge to be groundless. To my mind, the recording of his reasons must be done at the stage when the learned magistrate decides to act under section 173(g) of the Criminal Procedure Code and not afterwards, for example in his grounds of judgment, and after notice of appeal has been lodged. Failure to do so at the relevant time is not, in my view, a proper discharge of his judicial functions.